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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE STATE OF TEXAS,

Petitioner

vs.

RONALD CURTIS CHAMBERS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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3-1-4

QUESTIONS PRESENTED

I.

Should this Court's decision in *Estelle v. Smith,* 451 U.S. 454, be retroactively applied to overturn convictions final before the date of that decision?

II.

Did the Texas Court of Criminal Appeals correctly apply this Court's decision in *Estelle v. Smith,* 451 U.S. 454, to reverse a conviction in which a psychiatrist testified in the punishment phase of trial based on a pre-trial psychiatric examination which Respondent participated in voluntarily after being warned by his counsel to remain silent?

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No._____

IN THE

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OCTOBER TERM, 1984

THE STATE OF TEXAS,

Petitioner

vs.

RONALD CURTIS CHAMBERS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

The petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals of the State of Texas entered in this proceeding on December 5, 1984. The State's motion for rehearing was denied on March 27, 1985.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals, not yet reported, appears in the Appendix as *Ex parte Ronald Curtis Chambers,* No. 69,260. No opinion was rendered by the Court upon its denial of the State's motion for rehearing. A copy of the denial appears in the Appendix.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals setting aside Respondent's capital murder conviction was entered on December 5, 1984. The State's timely motion for rehearing was denied on March 27, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Ten years ago Ronald Curtis Chambers kidnapped and robbed two college students, brutally murdering one and attempting to murder the other. At Chambers' trial in July of 1975, the survivor testified against him and the State presented physical evidence further linking him to the crime. He was found guilty of capital murder. At the punishment phase of the bifurcated proceeding the State presented testimony of a psychiatrist who had examined Chambers prior to the trial. The psychiatrist testified that Chambers would be dangerous in the future. The jury sentenced Chambers to death.

Following Chambers' direct appeal, *Chambers v. State,* 568 S.W.2d 313 (Tex. Crim. App. 1978), denial of petition for writ of certiorari, 440 U.S. 928, 99 S.Ct. 1264, 59 L.Ed.2d 584 (1979), and two futile habeas attacks, the first denied without written opinion on October 17, 1979 (Tex. Crim. App. No. 7929), and the second denied in *Ex parte Chambers,* 612 S.W.2d 572 (Tex. Crim. App. 1981), the United States Supreme Court decided *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) on May 18, 1981.

Applicant filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Texas, Cause No. CA3-81-1953-R. On May 25, 1983 the petition was dismissed without prejudice for failure to exhaust state remedies.

On February 29, 1984, Chambers filed another application for writ of habeas corpus. In this application he alleged for the first time in State court that the requirements of *Estelle v. Smith* had not been met in his case. In its response to the application, the State argued procedural default (failure to object at trial to the psychiatrist's testimony on any constitutional ground), waiver of Fifth or Sixth Amendment privileges (Chambers was specifically

warned by his counsel prior to the psychiatric examination not to talk to any psychiatrists because his statements could be used against him at the punishment phase of the trial), and that *Solem v. Stumes* 465 U.S. ..... , 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) required that *Smith* not be applied retroactively.

The trial court ruled that there was no trial objection and, alternatively, that *Smith* should not be applied retroactively. It thus recommended that relief be denied.

The Court of Criminal Appeals rejected this recommendation of the trial court and ordered a hearing to develop facts relevant to the *Smith* issues. Appendix, p. A-3.

At the fact finding hearing Chambers' attorneys testified that they had known he would be examined by a psychiatrist, probably Dr. Grigson, and that they had warned Chambers specifically not to talk to any psychiatrists, telling him that the interview would be used by the State at the punishment phase of his capital murder trial in order to convince the jury to assess the death penalty. The trial court again filed findings of fact and conclusions of law that Chambers had been warned and that he had waived his rights. Appendix, p. A-17.

The Court of Criminal Appeals granted relief. It reiterated that it would apply *Smith* retroactively and held that the warnings in the form of advice of counsel did not satisfy the requirement of *Smith*. Appendix, p. A-3.

The State filed a motion for rehearing urging the Court of Criminal Appeals to address its argument that *Smith* not be applied retroactively in light of the recent *Stumes* decision. This motion was denied without written opinion.

The State seeks review of the decision of the Court of Criminal Appeals applying *Smith* retroactively and incorrectly.

REASONS FOR GRANTING THE WRIT

I.

This Court has never decided whether *Estelle v. Smith* should be prospectively or retroactively applied. The decision of this Court in *Solem v. Stumes* compels only prospective application of *Estelle v. Smith*. The action of the Texas Court of Criminal Appeals applying *Estelle v. Smith* retroactively is erroneous and should be reviewed.

Petitioner believes that the decision of this Court in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), should not, in light of this Court's decision in *Solem v. Stumes*, 465 U.S. ..... , 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) be applied retroactively to cases in which a conviction is being collaterally attacked. In *Stumes* it was held that this Court's decision in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981) should not be applied retroactively. *Edwards* held that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him since an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. In *Smith*, another Fifth Amendment decision, the Court held that where a defendant was not advised before a pre-trial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at the sentencing proceeding, the admission of the psychiatrist's testimony at that proceeding violated the defendant's Fifth Amendment privilege against compelled self-incrimination. The Court further held that admission of the psychiatrist's testimony violated the defendant's Sixth Amendment right to the assistance of counsel in deciding whether to submit to the examination and to what end the psychiatrist's findings could be employed. The *Edwards* and *Smith* decisions thus implicate similar constitutional rights.

The analysis of this Court in *Stumes* should be used to determine whether *Smith* is retroactive. *Stumes* held that the criteria guiding resolution of whether a new constitutional decision should be applied retroactively are 1) the purpose to be served by the new standards, 2) the extent law enforcement authorities relied on the old standards, and 3) the effect on the administration of justice of a retroactive application of the new standards. The *Stumes* analysis, when applied to *Smith*, compels non-retroactive application with even greater force than in *Edwards*. The Texas Court of Criminal Appeals has refused to address these issues.

Purpose of new standard

"Complete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials." *Stumes* 104 S.Ct. at 1342. In *Stumes* the Court noted that the "*Edwards* rule has only a tangential relation to truth finding at the trial." The request for a lawyer by an accused does not mean that his subsequent statements are likely to be inaccurate.

Similarly, the fact that an accused was not warned by the examining psychiatrist that his statements might be used to prove future dangerousness does not make those statements any less accurate.

Miranda itself was not applied retroactively to trials taking place before it was decided. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 2602, 16 L.Ed.2d 694 (1966). *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966). Whether a constitutional rule of criminal procedure enhances the reliability of the fact finding process at trial is a matter of degree. In *Stumes* and *Johnson* it was noted that pre-Miranda law would still protect an accused from being convicted by use of coerced confessions. The same should be true in coerced statements made to a psychiatrist.

Miranda can be no less important to enhancing accuracy than *Smith*, and *Miranda* is not retroactive. Since *Smith* flows from *Miranda* it can also be regarded as "a prophylactic rule, designed to implement pre-existing rights" and should not be applied retroactively. *Stumes* 104 S.Ct. at 1343. *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967).

Extent of reliance

In *Stumes* it was held that *Edwards* "established a bright-line rule to safeguard pre-existing rights, not a new substantive requirement" in that *Edwards* "did not overrule any prior decision or transform standard practice." Nevertheless, sufficient reliance was found to "consider the reliance interest compelling".

Similar analysis reveals that *Smith* was at least such a "newish"[1] decision. Prior to *Smith* it was accepted that punishment phase psychiatric testimony offering no threat of disclosure of prosecutable crimes involved no compelled testimonial self-incrimination. *Pollis v. Smith*, 572 F.2d 685, 690-691 (2d Cir. 1978); *Livingston v. State*, 542 S.W.2d 660 (Tex. Crim. App. 1976), *cert. denied*, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 250 (1977). It had also been held that the Miranda requirement of specific warnings did not apply outside the context of "the inherently coercive custodial interrogations for which it was designed." *Roberts v. United States*, 445 U.S. 552, 100 S.Ct. 1358, 63 L.Ed.2d 622 (1980). Authorities justifiably relied on these and other cases and state statutes to allow punishment phase psychiatric testimony. *See Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); and TEX.

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[1] *Shea v. Louisiana*, 470 U.S. ..... , 106 S.Ct. ..... , 84 L.Ed.2d 38 (February 20, 1985), Justice White, dissenting at 84 L.Ed.2d 38, 51. *Shea* held *Edwards* applicable only to cases on direct appeal at the time *Edwards* was decided. Justice White coined the distinction between "not new, newish and brand new" categories of decisions.

CODE CRIM. PROC. ANN. art. 46.02(3)(g) (Vernon 1979), which prohibits the use of statements made during the course of the examination in the *guilt* phase of the trial, thus impliedly permitting their admission at the punishment phase of the trial.

Petitioner notes that the only Fifth Circuit opinion dealing with the retroactivity of *Smith* (and not appealed to this Court) erroneously held "only a decision which establishes a new principle of law need be considered for prospective application. A decision which merely restates existing law to a set of facts different from those which gave birth to the original principle is given retroactive application." *Battie v. Estelle,* 655 F.2d 692, 697, (5th Cir. 1981). The Court in *Battie* held *Smith* merely applied already fixed principles to a new factual situation and gave *Smith* retroactive effect based on that finding. Not only did the three judge panel incorrectly hold *Smith* not to be "new", it engaged in that analysis at the threshold of its inquiry instead of as a part of the second criteria, reliance. Thus the analysis used by the *Battie* panel was incorrect. The correct standard of analysis is found in *Stumes* and in *Stumes* the newness of a decision is simply a part of the reliance analysis. *See Shea v. Louisiana.*

Effect on administration of justice

In *Stumes* the Court held it could "only guess" at the number of cases where *Edwards* might make a difference. The effect on the administration of justice of the retroactive application of *Smith* however can be "guessed at" with more confidence: one Texas psychiatrist alone has testified in several hundred cases. *Smith v. Estelle,* 445 F.Supp. 647, 653 n.7 (N.D. Tex. 1977). If the Court of Criminal Appeals is allowed to apply *Smith* retroactively and by rote (see next Question), the criminal justice system will be substantially disrupted. To incorrectly apply

Smith retroactively is to put an unnecessary burden on the victim witness and the State in retrying a case, the events of which took place over 10 years ago. The burden is especially unnecessary in this particular case because the accuracy of the fact finding process is not implicated: the accused was thoroughly warned by his counsel not to talk to any psychiatrist since the interview would be used against him at trial. There has never been any doubt as to the accuracy of Respondent's conviction in the face of the overwhelming evidence of his guilt. The facts brought out at the guilt phase of his trial alone were sufficient to support the imposition of the death sentence.

Retroactive application of *Smith* "would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Johnson v. New Jersey,* 86 S.Ct. at 1780.

Summary

It is clear that the criteria reiterated in *Stumes* when applied to *Smith* mandate a prospective application only. At the very least, *Smith* should not be applied in collateral attacks on convictions in which direct appeal was exhausted long before *Smith* itself was decided. Since this Court has never ruled on the retroactivity of *Smith* it should do so now.

II.

The record reflects that defense counsel fully warned Respondent not to talk to any psychiatrist and that the interview results would be used against him at trial; there was no violation of the requirements of *Estelle v. Smith.*

The Texas Court of Criminal Appeals held that the Respondent had not received adequate warnings of his Fifth

Amendment rights under *Estelle v. Smith.* While recognizing that defense counsel advised Respondent not to talk to a court-appointed psychiatrist, the Court concluded, "Advising a client not to talk is *not* the same as informing him at the beginning of interrogation that he has a 'constitutional right not to answer the questions put to him.' " *Ex parte Chambers,* No. 69,260 *slip op. at 3.* This holding is incorrect because Respondent received adequate warning of his Fifth Amendment rights from defense counsel.

The findings on Respondent's application for writ of habeas corpus, which were not challenged by the Court of Criminal Appeals, establish the following facts. Prior to the examination, defense counsel and Respondent were informed by the trial court that Dr. James Grigson would be appointed to examine the Respondent. During their representation of Respondent, and prior to the interview, defense counsel admonished Respondent that he should not talk to any "psychiatrist" about the case or the charges against him. Defense counsel told Respondent that any interview he might give to a psychiatrist could be used against him. Finally, counsel informed Respondent that the State might use the interview at the punishment phase of trial to convince the jury to assess the death penalty. Findings of Fact and Conclusions of Law (Appendix, p. ....).

Estelle v. Smith does not mandate that any particular person deliver the Fifth Amendment warnings to the defendant. Indeed, *Smith* requires only that the defendant be informed that "the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death" and that "he had a constitutional right not to answer the questions put to him." *Estelle v. Smith,* 451 U.S. 467.

Defense counsel informed Respondent both of the fact of the upcoming psychiatric examination and its probable effect on his

defense if he spoke to Dr. Grigson. In fact, counsel informed Respondent that if he participated in an interview with a psychiatrist, the evidence obtained there would be used against him to convince the jury to assess the death penalty. Although counsel apparently did not inform Respondent that he had a *constitutional* right to refuse to speak with the psychiatrist, he did inform Respondent of the nature and consequences of the interview and told him not to talk to the psychiatrist. This should be adequate warning of the Respondent's rights. Emphatically, this is not a case where Respondent was made the "deluded instrument of his own execution." *Estelle v. Smith,* 451 U.S. 462.

The Court of Criminal Appeals' holding on this issue is erroneous and should be overturned.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

EX PARTE RONALD CURTIS CHAMBERS
NO. 69,260

Habeas Corpus Application
from DALLAS County

OPINION

This is a post-conviction habeas corpus application filed pursuant to Art. 11.07, V.A.C.C.P. The application was ordered filed and set for submission "on the allegations that the admission of Dr. Grigson's testimony violated the Applicant's rights under the Fifth and Sixth Amendments to the United States Constitution."

Petitioner was convicted of capital murder and the death penalty was assessed. On appeal the conviction was affirmed. Chambers v. State, 568 S.W.2d 313. It is now contended that the psychiatric testimony used during the punishment phase of the trial was improperly obtained through an interview of appellant by Dr. Grigson without appellant having been advised of his Fifth Amendment privilege. Reliance is placed on Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359, which was decided after appellant's trial and appeal. In *Smith* the Court held:

> "The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted. That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the

crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting. During the psychiatric evaluation, respondent assuredly was 'faced with a phase of the adversary system' and was 'not in the presence of [a] person [ ] acting solely in his interest.' [*Miranda v. Arizona,* 384 U.S. 436] at 469, 16 L.Ed.2d 694, 86 S.Ct. 2602, [at 1625] 10 Ohio Misc. 9, 36 Ohio Ops. 2d 237, 10 ALR3d 974. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.

"The Fifth Amendment privilege is 'as broad as the mischief against which it seeks to guard,' *Counselman v. Hitchcock,* 142 U.S. 547, 562, 35 L.Ed. 1110, 12 S.Ct. 195 [197] (1982), and the privilege is fulfilled only when a criminal defendent is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence.' *Malloy v. Hogan,* 378 U.S. 1, 8, 84 S.Ct. 1489 [1493,] 12 L.Ed.2d 653 (1964). We agree with the Court of Appeals that respondent's Fifth Amendment rights were violated by the admission of Dr. Grigson's testimony at the penalty phase."

When the district court originally ruled on the application for habeas corpus, it found appellant had not made a trial objection on the matter, and alternatively found that Estelle v. Smith should not be given retroactive application. On the basis of these findings the district court recommended that relief be denied.

This Court in other post-*Smith* cases involving trials occurring before the *Smith* decision has found the failure to object did not constitute a waiver, and has given retroactive application to the

Smith decision. Mays v. State, 653 S.W.2d 30, Ex parte Demouchette, 633 S.W.2d 879. We therefore rejected the findings upon which the district court recommended that relief be denied. The record before us, however, did not clearly reflect whether or not the requirements of Estelle v. Smith were violated in this case. We therefore directed the district court to conduct a hearing to develop the facts on the matter, and then to enter findings of fact. A hearing has been held and the record and new findings by the trial court have been received by this Court.

In again recommending that relief be denied, the trial court relies on the fact that during consultation with petitioner, at some indefinite date before he was interviewed by Dr. Grigson, his trial attorneys advised him to speak to no one except counsel, and specifically instructed him not to talk to any psychiatrists because such evidence could be used against him. We do not agree that such consultation with counsel at some indefinite date prior to the interview with Dr. Grigson satisfies the requirements of Estelle v. Smith, supra. Advising a client not to talk is *not* the same as informing him at the beginning of interrogation that he has "a constitutional right not to answer the questions put to him." Estelle v. Smith, supra. The testimony of Dr. Grigson at the hearing in the trial court is uncontradicted: petitioner was not advised that he had a constitutional right not to answer the questions put to him by Dr. Grigson. See *Mays*, supra.

Relief is granted. The conviction is set aside and petitioner is ordered remanded to custody of the Sheriff of Dallas County to answer the indictment pending against him in Cause No. F75-4282-K.

It is so ordered.

ODOM, Judge

(Delivered December 5, 1984)
En Banc

EX PARTE RONALD CURTIS CHAMBERS
No. 69,260

Habeas Corpus Application
from DALLAS County

CONCURRING OPINION

Applicant was convicted in 1976 of capital murder. In this writ of habeas corpus he challenges the conviction on the basis that he was deprived not only of his Fifth Amendment right as elucidated in the majority opinion, but also of his Sixth Amendment right to counsel. While I concur with the judgment of the Court reversing applicant's conviction, I am also of the opinion that his Sixth Amendment rights were clearly violated.

The evidence adduced at the evidentiary hearing was uncontradicted that applicant had both appointed and retained counsel at the time that Dr. Grigson was appointed to evaluate applicant. The record is also undisputed that Dr. Grigson evaluated the applicant on the very same day that the trial judge ordered him appointed and that applicant's lawyers were not given advance notice that Dr. Grigson would evaluate their client; nor were counsel given the opportunity to consult and advise applicant regarding Dr. Grigson's appointment and evaluation. Finally, applicant carried his burden in showing that counsel was unaware that Dr. Grigson's appointment and evaluation would encompass the issue of petitioner's "future dangerousness".

The United States Supreme Court in Estelle v. Smith, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) unanimously held that a person under indictment for capital murder, who has counsel representing him, is entitled under the Sixth Amendment to consult with his attorneys prior to any psychiatric evaluation. Under the Supreme Court's holding in *Smith*, counsel

representing a capital defendant is entitled to be made aware of a pending psychiatric evaluation and to advise and prepare his client prior to any evaluation occurring. *Estelle v. Smith*, supra, at 476, 1979. (concurrence, Rehnquist, J.). The facts in this case are indistinguishable from *Smith* insofar as petitioner's Sixth Amendment claim is concerned.

This Court in capital murder cases has uniformly followed the teachings of *Smith*. Ex parte Demouchette, 633 S.W.2d 879 (Tex. Crim. App. 1982); Fields v. State, 627 S.W.2d 714 (Tex. Crim. App. 1982); Mays v. State, 653 S.W.2d 30 (Tex. Crim. App. 1983). There is no question but that *Smith* is to be applied retroactively. Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981); Cf. *Fields*. supra, (McCormick, J. dissenting.).

The issue that requires further development in the majority opinion is whether the applicant has in fact waived any constitutional error by failing to timely and properly object at trial to the admission of the evidence in question. This Court has, in the past, not applied a contemporaneous objection rule to this type of error. See *Demouchette*, supra, *Fields*, supra, and *Mays*, supra. Recently, however, this Court has applied a contemporaneous objection rule in a non-capital direct appeal. Parker v. State, 649 S.W.2d 46 (Tex. Crim. App. 1983).

In *Parker*, supra, Presiding Judge Onion applied what he perceived to be a "waiver of constitutional error" rule enunciated by the United States Supreme Court in Engle v. Isaacs, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), and held that the fact that an objection may have been futile at the time of Parker's trial, such futility did not necessarily constitute cause for Parker's failure to object.

In *Engle v. Isaacs*, supra, the Supreme Court held that before a federal court exercises its habeas corpus jurisdiction pursuant

to 28 U.S.C.A. 2254, interests of comity demand that a petitioner demonstrate "cause and prejudice" if he has failed to follow State procedural rules, such as failing to timely object. If a federal court finds that there has been a "state procedural default" than a petitioner must demonstrate 'cause and prejudice' for the default. In *Engle* the petitioner argued that any objection on his part would have been futile; the Supreme Court rejected the futility of an objection as "cause". However the Court specifically left open the question of whether the novelty of a constitutional claim would ever establish "cause". *Engle*, supra, at 130, 1573.

The question left open in *Engle* was answered just last term in Reed v. Ross, ... U.S. .... , 104 S.Ct. 2901, ...L.Ed.2d. ..... (1984). In *Reed*, supra, the United States Supreme Court established that, *as far as exercise of federal habeas jurisdiction by a federal court reviewing a state criminal conviction, "cause" is established when the novelty of a constitutional right could not reasonably have been known by competent counsel at the time of trial.* (Emphasis added). That Court specifically held "that where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." Id., at 2910.

I submit that under the Supreme Court's analysis, applicant in the case sub judice would have a forum in federal court. The constitutional violation here challenged could not reasonably have been known to counsel at the time of trial since it was not known right until six years after the trial.

Of equal significance to this writer is *this* State's own procedural default rule. While the teachings of *Engle* and *Reed* may be instructive, they are in no way binding on this Court. The rules enunciated in *Engle* v. *Isaacs* and *Reed* v. *Ross* concern the exercise of federal habeas jurisdiction once a State procedural

default has been shown. See Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d. 594 (1977). I do not interpret these cases as attempting to impose a federal procedural waiver standard to be used by State courts.

This Court has for at least twelve years held that a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized. Ex parte Taylor, 484 S.W.2d 748 (Tex. Crim. App. 1972); Ex Parte Sanders, 588 S.W.2d 383 (Tex. Crim. App. 1979); Ex Parte Casarez, 508 S.W.2d 620 (Tex. Crim. App. 1974); Boulware v. State, 542 S.W.2d 677 (Tex. Crim. App. 1976); Cuevas v. State, 641 S.W.2d 558 (Tex. Crim. App. 1982). In view of these cases decided by this Court and in view of the extension by the Supreme Court of the doctrine in *Engle v. Isaacs* to its current posture in *Reed v. Ross*, I would reaffirm the holding in *Cuevas*, supra, that "where a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver", and I would overrule *Parker*, supra, to the extent that it is in conflict.

With the foregoing in mind, I concur with the judgment of the Court.

Campbell, Judge

Delivered December 5, 1984

En Banc

W. C. Davis, Clinton, McCormick, Teague, Miller, JJ., join this opinion as well as the majority opinion.

WRIT NO. 7929
IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

EX PARTE RONALD CURTIS CHAMBERS
Habeas Corpus Application from Dallas County

ORDER

On this day came to be considered the application for post conviction writ of habeas corpus filed by the applicant in Criminal District Court Number 4 of Dallas County pursuant to Art. 11.07, V.A.C.C.P., and it is hereby ordered that such application shall be filed and set for submission to the Court on March 21, 1984, without oral argument, on the allegations that the admission of Dr. Grigson's testimony violated the applicant's rights under the Fifth and Sixth Amendments to the United States Constitution. We find no merit to the other allegations raised in the application.

It is further ordered that the execution of the applicant, which has been ordered by the trial court to be carried out on March 30, 1984, is hereby STAYED and POSTPONED pending review and final disposition by this Court of this application in accordance with the provisions of Art. 11.07, V.A.C.C.P.

It is so ordered this 19th day of March, 1984.

Per Curiam

En Banc

CCA WRIT NO. 69,266
STATE WRIT NO. W75-4282-K

EX PARTE	**§ In the Criminal**
	§ District Court No. 4 of
RONALD CURTIS CHAMBERS	**§ Dallas County, Texas**

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR WRIT OF HABEAS CORPUS

This Court having held a Writ hearing pursuant to the Texas Court of Criminal Appeals Order No. 69,260 and considering the issues presented in said Order, makes the following Findings of Fact and Conclusions of Law:

HISTORY OF THE CASE

Applicant was convicted on a plea of not guilty of the offense of Capital Murder and sentenced to Death in Cause No. F75-4282-K. Jury selection began July 7, 1975. Trial on the merits was conducted July 17-19, 1975. Applicant was represented by the Honorable Sam Hudson, retained counsel of record at trial, and by the Honorable Steve Halsey, court-appointed counsel at record at trial.

Applicant's case was affirmed on appeal. *See Chambers v. State,* 568 S.W.2d 313 (Tex. Crim. App. 1978). The United States Supreme Court denied Applicant's Petition for Writ of Certiorari. *See Chambers v. Texas,* 440 U.S. 928, 99 S.Ct. 1264, 59 L.Ed.2d 584 (1979).

Applicant subsequently filed two post-conviction Applications for Writ attacking the instant case, to-wit: W-79-40008-K and W-80-40049-K. The first Writ was denied as

Writ No. 7929, while the second Writ was denied in a published opinion styled *Ex parte Chambers,* 612 S.W.2d 572 (Tex. Crim. App. 1981).

In November of 1981, Applicant petitioned the United States District Court for the Northern District of Texas, Dallas Division for habeas relief. Ultimately, said Cause No. CA-3-81-1953-R was dismissed without prejudice for failure to exhaust available State remedies.

On January 30, 1984, this Court ordered Applicant's execution by injection on March 30, 1984. On February 29, 1984, Applicant filed the instant Application for Writ of Habeas Corpus as well as a Motion to Stay Execution. The State filed its Response to both. This Court recommended that the Writ be denied, and that the execution not be stayed. On March 19, 1984, the Texas Court of Criminal Appeals in Per Curiam Writ No. 7929 ordered the Writ set for submission and granted Applicant's stay of execution based upon his Motion to Stay Execution which had been filed with the Texas Court of Criminal Appeals. On March 28, 1984, the Texas Court of Criminal Appeals in Per Curiam Opinion No. 69,260, ordered that this Court conduct an evidentiary hearing on *Estelle v. Smith* issues. It further ordered that the stay of execution remain in effect pending final disposition of the Application for Writ. On May 21, 1984 this Court held an evidentiary hearing as ordered.

LAW APPLICABLE

The Writ hearing was ordered and was held on *Estelle v. Smith,* 451 U.S. 454, 68 L.Ed.2d 359 (1981), issues. The Texas Court of Criminal Appeals raised these issues in the context of psychiatric testimony given against this Applicant at the punishment phase of this trial. Dr. Grigson, a psychiatrist, interviewed Applicant before trial. Based upon the interview, he

testified at the punishment phase of Applicant's death penalty case that there was probability that Applicant would commit criminal acts of violence that would constitute a continuing threat to society. This is the second special issue involved in a determination of whether death is a proper punishment.

Estelle v. Smith, supra, holds that when a psychiatrist interviews a defendant pre-trial and the psychiatrist subsequently testifies at the punishment stage of the trial using the remarks made by the defendant during the interview, then there must have been compliance with both the Fifth Amendment and the Sixth Amendment. The Fifth Amendment requires that the defendant must have been told that when the psychiatrist questioned him, he had a right to remain silent and that any statement he made could be used against him at the punishment portion of the trial. The Sixth Amendment rights require that defense counsel must have been notified in advance of the fact of the psychiatric examination and that it would cover the issue of the defendant's future dangerousness.

The main concern of *Estelle v. Smith, supra,* is the Fifth Amendment rights. Of course, a defendant may waive both his Fifth Amendment rights and his Sixth Amendment rights. *Johnson v. Zerbst,* 304 U.S. 458,464, 82 L.Ed.2d 1461, 58 S.Ct. 1019 (1938); *Mays v. State,* 653 S.W.2d 30 (Tex. Crim. App. 1983). There is a presumption againt waiver, yet waiver may be shown under this case law if it fully knowing and voluntary. Furthermore, in that *Estelle v. Smith, supra,* emphasizes the Fifth Amendment rights as the rights of prime importance, the case makes it clear that if the rights are fully knowingly and voluntarily waived, Applicant may also be said to have waived his Sixth Amendment rights.

Lastly, it is very important to note that with respect to a post-conviction Application for Writ as well as an evidentiary

hearing thereon, the defendant bears the burden of proof. *Ex parte Alexander,* 598 S.W.2d 308 (Tex. Crim. App. 1980). *Johnson v. Zerbst, supra,* makes it clear that this principle of burden of proof applies to exactly the kind of case involved with respect to this Applicant. Thus, this Applicant must prove that he did not waive his Fifth Amendment rights as well as his Sixth Amendment rights. Involved in this is the fact that the defendant/this Applicant must show that he did not waive his Sixth Amendment rights by a fully knowing and voluntary waiver of his Fifth Amendment rights.

ISSUES INVOLVED IN DETERMINATION OF COMPLIANCE WITH ESTELLE V. SMITH

1. Whether or not Applicant was given the warnings required by the Fifth Amendment as noted in *Estelle v. Smith.* If the warnings were given, when were the warnings given and how were they phrased. Did Applicant understand the warnings. If he was not given the warnings, do any improprieties exist.

2. Whether or not counsel for Applicant was told of the interview and that it would encompass future dangerousness or punishment. If counsel was told, when was he told and how were the admonishments to him phrased.

3. Whether the Fifth Amendment prong was met.

4. Whether the Sixth Amendment prong was met.

5. If the Sixth Amendment prong was not met, whether or not this prong was waived.

FINDINGS OF FACT

1. Applicant committed the offense of capital murder on April 11, 1975. (R. I-2; "R.I." will represent the appellate transcript of the original trial). Applicant was arrested on the following day, April 12, 1975. (R. II-107; "R. II" will represent the Writ hearing Statement of Facts). Sam Hudson was retained to represent Applicant on April 15, 1975. (R. II-79). On April 29, 1975, the Court appointed Steve Halsey and Tom Mills to represent Applicant. (R. I-6). It was only very shortly after the appointment of these two attorneys that this Court learned that Sam Hudson was retained; therefore, it withdrew both appointments. (R. II-52-53,69). Immediately after withdrawing both appointments, this Court determined that Applicant needed a second attorney to represent him in this serious capital murder case, that he could not afford a second attorney, and that such would need to be appointed; therefore, this Court appointed Steve Halsey. (R. II-79-80,85,104-105). Mr. Halsey was re-appointed by early May of 1975.

On June 23, 1975, a pre-trial hearing was held in open Court in this case with the State's attorney, Douglas Mulder, both of Applicant's attorneys, and Applicant present. (R. I-4); (R. II-70-71,96-97). On June 27, 1975, the State presented its Motion to Request Appointment of Psychiatrist to have Applicant examined on the questions of present competency and sanity at the time of the offense. (R. I-96; R. II-15-16). On this same day of June 27, 1975, the Court signed an order ordering Dr. Grigson, a psychiatrist, to examine Applicant on competency, sanity, and the danger to Applicant in his staying in the jail if Applicant was mentally ill. (R. I-85; R. II-15-16). Dr. Grigson then examined Applicant on this same day, June 27, 1975. (R. II-15-16). Subsequently, Dr. Grigson testified at punishment based upon the interview. Applicant was properly given his Fifth Amendment warnings.

Sam Hudson and Steve Halsey told Applicant at several points during the representation of him, and prior to Dr. Grigson's interview, that he was charged with capital murder, that this was a serious case, and that he was not to talk to anyone except them, his attorneys, about the case and the charges against him. (R. II-40-43,55-59). Steve Halsey stressed this advice by telling Applicant not to talk to cellmates, visitors, police officers or any "psychiatrist" about the case or charges against him. (R. II-58-59). Furthermore, Steve Halsey told Applicant that such people could be used against him in his capital murder case.

Additionally, Steve Halsey told Applicant that any interview he might give a psychiatrist could be used against him in his capital murder case. (R. II-59). Steve Halsey was concerned about the use of a psychiatrist at punishment to obtain the death penalty due to Dr. Grigson's unexpected testimony in such a manner on a prior death penalty case in which Mr. Halsey had been involved. (R. II-59-63). Steve Halsey told Applicant that either Dr. Grigson or Dr. Holbrook, psychiatrists, would likely come up to interview him. (R. II-62-63). He told Applicant that they would attempt to obtain personal information and ask him about the capital murder case, yet he must not talk to the psychiatrists. (R. II-62-63). He further told Applicant that he must not talk to the psychiatrist because the State would use the interview at the punishment phase in order to prove up the State's case and convince the jury to assess the death penalty. (R. II-62-64).

The time that all of these warnings were given is unclear, other than the fact that they were given prior to the Dr. Grigson examination. (R. II-55-65,69-70). To the extent of the lack of clarity, such should be held against Applicant who has the burden of proof. Yet what is clear is that the Applicant was given the warnings at a time and in such a manner that he realized that he had a right not to talk to the psychiatrist and that he furthermore realized exactly how his interview could be used against him.

Applicant completely understood his Fifth Amendment rights. Many of the warnings were repeated to Applicant. The warnings were all emphasized. It is clear for several reasons that Applicant understood these warnings. First, his attorneys believed that he had understood all of their warnings. (R. II-41-65-66). Second, he was given repeated *Miranda* warnings at the time of his arrest, at various points in his incarceration, at the time he was magistrated, and at the time he was asked if he wished to make a statement. (R. II-106-122). He told these officers that he understood exactly what they said and demonstrated such when he told the officer wishing to take the statement that he did not have to talk to anybody but his lawyer. (R. II-112-113). Hence, when Applicant was told by his attorneys not to talk to anyone including "psychiatrists," and the reasons for such were explained in depth, it is clear that Applicant understood these warnings.

No improprieties are shown by Applicant's attorneys in terms of warnings given by them to Applicant. No improprieties are shown by Dr. Grigson. He did not warn Applicant because warnings were not required to be given by a psychiatrist to a defendant in this posture at that time. (R. II-18). Dr. Grigson did not lead Applicant into responding during the interview, and Applicant freely and voluntarily answered each question asked him by Dr. Grigson. (R. II-22). There are no improprieties on the part of the State with respect to the psychiatric testimony. Doug Mulder, in fact, intended to use a hypothetical because he did not believe Applicant, whom he assumed had been warned by his attorneys, would talk to Dr. Grigson. (R. II-98-99). First, Doug Mulder wanted to resolve in his own mind whether or not Applicant was sane and competent to stand trial in that he did not wish these issues raised in the middle of a death penalty case. (R. II-93-94). Second, if he did use a hypothetical with Dr. Grigson, he wanted Dr. Grigson to at least have attempted to talk to Applicant so that Applicant's attorneys could not on

cross-examination of the hypothetical point out that it would have been better if the psychiatrist had personally interviewed Applicant. (R. II-99). In fact, a substantial hypothetical was posed to Dr. Grigson at the Writ hearing, which hypothetical was totally supported by the record and not based in any fashion upon the psychiatric interview. Dr. Grigson testified based upon this hypothetical in support of the same second special issue involved in the punishment phase of a death penalty — "future dangerousness".

3. The next issue involves the question of Applicant's Sixth Amendment rights. In other words, whether or not Applicant's attorneys were told that the psychiatric interview would encompass future dangerousness or punishment. In April or early May of 1975, Sam Hudson was told by Doug Mulder that he would petition the Court to appoint a psychiatrist to examine Applicant on sanity and competency, asking Mr. Hudson if he had preference of either Dr. Holbrook or Dr. Grigson. (R. II-92-94). Mr. Hudson was never given notification as to the exact day or time of the psychiatric interview. Steve Halsey testified that his recollection was that he knew of Dr. Grigson's interview only after it occurred, yet he was not absolutely certain on this point. (R. II-53). J. A. Snow, court-coordinator, testified that he remembered talking to Steve Halsey and informing him of Dr. Grigson's appointment to interview Applicant. (R. II-125). He indicated that he told Mr. Halsey this within 20 or 30 minutes after telling Dr. Grigson of the appointment and Dr. Grigson then telling him that he would soon go to see Applicant. (R. II-125-129). It is, thus, unclear whether Mr. Snow's warning came before the examination, during the examination, or after the examination. Lack of clarity on this point should be held against Applicant, who has the burden of proof.

At the June 23, 1975, Pre-trial hearing four days before the psychiatric interview —, Doug Mulder, both of Applicant's

attorneys, and Applicant were present in court. (R. II-96-97). It was at that time that Doug Mulder requested the appointment of a psychiatrist on sanity and competency issues, yet this Court told him that it required a written motion. (R. II-96-97). All parties were aware of this request.

What is clear is that Applicant's attorneys were aware that there would be a psychiatric examination prior to the actual examination. Yet it is also clear that they were not told that it would encompass any "punishment issues" or the issue of "future dangerousness."

Lastly, Sam Hudson did see a copy of the Motion for psychiatric appointment and the Order appointing. (R. II-45). He saw these a day or two after the examination. (R. II-45). Additionally, he saw a copy of Dr. Grigson's report in the trial jacket in advance of trial. (R. II-79-80). Both of Applicant's attorneys knew that Dr. Grigson would testify and knew what he would testify to prior to his actual testimony. (R. II-47,67).

CONCLUSIONS OF LAW

1 Applicant was fully and adequately warned of his Fifth Am ıdment rights as required by *Estelle v. Smith, supra.* He waived these rights in the manner required by *Johnson v. Zerbst, supra; Mays v. State, supra;* and *Heflin v. State,* 647 S.W.2d 58 (CA – Austin – 1982 – P.D.R. ref'd.). Applicant understood his Fifth Amendment rights and fully voluntarily and knowingly waived them. By waiving them in this manner, he also waived his Sixth Amendment rights. *Estelle v. Smith, supra; Mays v. State, supra;* and *Ex Parte Alexander, supra.*

2. The Court finds that the Applicant has not been denied any rights guaranteed him by the Constitution of the United States or the Constitution of Texas.

3. The Court finds that the Applicant is lawfully restrained and confined by Respondent.

4. The Court is of the opinion that the Applicant's Application for Writ of Habeas Corpus is totally without merit and recommends that the same be denied.

ORDERS OF THE COURT

In implementing the Court's Findings of Facts and Conclusions of Law, the Clerk will:

1. Prepare a transcript of all papers in this Cause and transmit the Court's Findings and Order, including the indictment, judgment, sentence, 1984 Texas Court of Criminal Appeals' Stay of Execution, March 28, 1984 Order of the Texas Court of Criminal Appeals mandating this Writ hearing, both side's proposed Findings/Conclusions and briefs, the trial docket sheets, and other exhibits and evidentiary matter filed in the trial records of this Cause, to the Court of Criminal Appeals as provided by Article 11.07, V.A.C.C.P.

2. Send a copy of these Findings of Fact and Conclusions of Law, and the Order thereon, to the Applicant and his counsel by depositing same in the U.S. Mail.

SIGNED AND ENTERED this the 20th day of June, 1984.

/s/ JOHN MEAD

Judge

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE
Austin, Texas, March 27, 1985

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the State's Motion for Rehearing in Cause No. 69,260

EX PARTE: RONALD CURTIS CHAMBERS
vs.
THE STATE OF TEXAS Appellee.

Sincerely yours,

THOMAS LOWE, Clerk